Graham-Windham Services to Families and Children, Inc. *and* United Food and Commercial Workers Union, Local 342-50, Health Care and Human Services Division, AFL–CIO. Case 2–CA–24600

November 22, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 21, 1993, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

1. The judge ruled that the Respondent was precluded from using at the hearing any materials which it should have provided the General Counsel pursuant to paragraphs 1 and 3 of the subpoena duces tecum served upon it. Paragraph 1 requested personnel handbooks, rule books, guidebooks, codes of employee conduct and the like, while paragraph 3 requested the Respondent's campaign material. The judge also granted the General Counsel's posthearing motion to strike certain portions of the record relating to the material requested in paragraph 1 of the subpoena duces tecum. The Respondent excepts to all these rulings.

We affirm the judge's rulings pertaining to paragraph 1 of the subpoena. Clearly ignoring the judge's instruction to submit the requested documents to the General Counsel, the Respondent attempted to introduce a purported company employee handbook while cross-examining a witness provided by the General Counsel on the second day of the hearing. Further, even assuming that the judge should not have struck the eight transcript pages because the Respondent was trying to use secondary evidence concerning the material encompassed by paragraph 1 of the subpoena, we observe that any such error would be harmless. The testimony at issue was provided by Supervisor Sadie Oliver and Director Robert Egan, who were specifically discredited by the judge, and by Vice President Stafford, whose testimony about the timing of the distribution of the union flyer by childcare worker Anita Burks was not relied on by the judge. We find it unnecessary to pass on the judge's rulings involving paragraph 3 of the subpoena duces tecum. In this regard, we note that the judge's finding of unlawful disparate treatment by the Respondent of union flyers was not dependent on the presence or absence of the materials sought in the subpoena. Accordingly, the Respondent suffered no adverse consequences because of the judge's rulings.

2. The Respondent argues that the judge's finding that Supervisor Oliver made unlawful promises to employee Askew was improper because it depended on a theory that had not been alleged or litigated. We find no merit in this argument.

Paragraph 7 of the complaint alleges, inter alia, ''[o]n or about August 7, 1990, Respondent, acting through Oliver, at its Hastings-On-Hudson facility, solicited grievances from employees, and implicitly promised to remedy said grievances.'' Child care worker Ruth Askew testified that on August 9, 1990, her supervisor, Sadie Oliver, spoke to her. In that conversation, Oliver promised that the Respondent would give the employees a break, but if the Union came in it would not save their jobs. Oliver also promised that working conditions would improve, indicating that the Respondent would rehabilitate two closed cottages and hire more staff. The record reveals that, through the winter of 1990, Askew had repeatedly complained about poor heating in the cottages and understaffing. The judge found that Oliver's promises violated Section 8(a)(1) by connecting a vote against the Union with better conditions and retention of jobs. Thus, the violation found by the judge was reasonably encompassed within paragraph 7 of the complaint. Furthermore, it was fully litigated at the hearing.

In any event, even assuming as the Respondent asserts that it had no notice prior to the hearing of the specific violation found by the judge, the Respondent does not allege that it was precluded from adducing

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces up that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Based on our examination of the record, we are also satisfied that there is no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated any bias. Thus, we find no merit to the Repondent's contention that the judge was biased against its position in this case.

In fn. 4 of her decision, the judge incorrectly stated that the Respondent did not ''at any time'' request special permission to appeal from her initial ruling on par. 1 of the General Counsel's subpoena duces tecum. The Respondent filed such a request on November 21, 1991. However, this filing was after the General Counsel had presented his direct case and before the hearing resumed on the sixth day. This inadvertent error of the judge does not affect our decision.

[2] We agree with the judge's recommendation that the Board take action against counsel for the Respondent pursuant to Rules and Regulations, Sec. 102.21, for willfully interposing an answer to a complaint without a good-faith doubt of the facts asserted in the complaint and for the purpose of delay. We express our strong disapproval of such conduct by Richard S. Boris, Esq. and Neal D. Haber, Esq. and warn them against similar conduct in future appearances before the Board.

any exculpatory facts. Oliver testified to a different version of the same August 9 conversation with Askew and denied the critical statements attributed to her by Askew. Nor does the Respondent argue that it would have litigated its case at the hearing differently had it received what it would deem adequate notice. Hence, there is no showing that the Respondent has been prejudiced. See *Baytown Sun*, 255 NLRB 154 (1981).

In declining to find a violation here, our dissenting colleague takes the position that the judge ignored her own admonition to the General Counsel that she would not find unalleged violations. We are not persuaded by this view. According to the credited evidence, Oliver offered to remedy previously stated grievances submitted by Askew by promising her desirable job improvements. Offering to remedy previously stated grievances by promising benefits does not significantly differ from soliciting grievances and implicitly promising to remedy them, the wording of the complaint. The judge clearly did not view such a slight variance in phraseology as falling within the purview of her admonition, and we agree.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Graham-Windham Services to Families and Children, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, dissenting in part.

Unlike my colleagues, I would not adopt the judge's finding that Supervisor Oliver unlawfully promised benefits to employee Askew in order to dissuade her from supporting the Union.

This violation was not specifically alleged in the complaint. Paragraph 7 of the complaint alleged an *unlawful solicitation of grievances* with the implicit promise to remedy those grievances. It did not allege a promise of benefits unrelated to a solicitation of grievances, the violation found by my colleagues. This variance could easily have been corrected. Indeed, the judge offered the General Counsel the opportunity to do so. In this regard, the transcript reflects that, at trial, the General Counsel made a motion to conform the pleadings to the proof. The judge denied the motion but invited the General Counsel to propose any specific amendment that the General Counsel believed was warranted by the record evidence. The General Counsel declined to offer any such amendment. The judge further stated on the record:

> I'm not going to find any unfair labor practices that are[n't] alleged in the complaint. Especially since General Counsel declines to amend the complaint. So I think that should be guidance to you. You're entitled to know what you're up against.

Notwithstanding these express assurances, the judge found a violation based on the Oliver-Askew conversation.

Surely, the colloquy at trial led the Respondent to believe that the judge's findings would be in strict compliance with the allegations of the complaint. In these circumstances, the Respondent was entitled to conclude that the General Counsel did not seek, and the judge would not make any findings beyond those specifically alleged by the complaint. In my view, fundamental notions of fair play, and the principle that parties should be able to rely on representations from a judge, both dictate that the Board should not find the violation.[1]

On this basis, I would decline to find that the Respondent made an unlawful promise of benefit.[2]

[1] My colleagues equate a complaint allegation concerning solicitation of grievances and the violation found in this case. The two are not the same. In cases involving solicitation of grievances, the employer asks employees if they have any grievances. The theory of violation is that the employer is impliedly promising to redress any grievances that may exist, thereby eliminating the need for a union. By contrast, the evidence in the instant case is that grievances already existed. *There was therefore no need to solicit grievances, and in fact there was no solicitation of grievances*. Rather, there was simply a promise of benefits if the employees rejected the Union.

I am not suggesting that there is an enormous difference between the complaint and the violation found herein. Indeed, it was the kind of variance that can be easily cured by a complaint amendment at trial. That opportunity was offered to the General Counsel. He declined to amend. I would not rescue him from his failure to do so.

[2] Because I find that the judge's assurances at trial preclude findings beyond those specified in the complaint, *Baytown Sun*, 255 NLRB 154 (1981), cited by my colleagues, offers no guidance. That case suggests, and I agree, that in appropriate circumstances the Board will make findings regarding matters that were fully litigated at trial. Here, because of the judge's statements at trial, the circumstances are not appropriate for finding a violation, even if the matter at issue was fully litigated.

Suzanne K. Sullivan, Esq., for the General Counsel.
Richard S. Boris and *Neal D. Haber, Esqs. (Moss & Boris, P.C.)*, of New York, New York, for the Respondent.
Lawrence Kolodney, Esq. (Broach & Stulberg), of New York, New York, for the Union.[1]

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 8 days between October 7, 1991, and March 6, 1992. The amended com-

[1] The Union did not enter an appearance in this proceeding on the first day of the instant hearing. However, when Respondent served a subpoena on the Union, the Union made an appearance in order to file and argue its petition to revoke. Counsel for the Union did not attend from day to day, but instead appeared again when a second subpoena was served on the Union.

plaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, threatened its employees with discharge, engaged in surveillance, promised benefits, promulgated and disparately enforced a no-posting rule, promulgated and enforced an overly broad no-distribution rule, promised a wage increase and solicited grievances. Respondent denies that it engaged in any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in June 1992, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office in New York, New York, is a social service agency providing a variety of services to families and children. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union commenced an organizing campaign at Respondent's facilities in January or February 1990. Graham-Windham operates three divisions throughout the New York City metropolitan area: a group home division, a foster home boarding division, and a residential campus in Hastings-on-Hudson, New York.

B. *Matters Relating to General Counsel's Subpoena Duces Tecum*

Counsel for the General Counsel served a subpoena duces tecum on the Respondent and the Respondent filed a petition to revoke as to certain paragraphs. I will discuss matters relating to the subpoena briefly and only insofar as a ruling was required at the hearing and issues relating to the ruling arose in the course of questioning the witnesses.

Paragraph 1 of the subpoena requested personnel handbooks, rule books, guidelines, codes of employee conduct and the like. On the first day of the instant hearing, counsel for the General Counsel agreed to limit her request to any materials applicable from February 1990, forward. Counsel for Respondent acknowledged on the record that any policy or rule relating to solicitation on Respondent's property was relevant to the case and that a policy or rule on the posting of materials would also be relevant. Counsel for Respondent resisted turning over any rules to counsel for the General Counsel and urged that he did not want the Union to see any material that might be turned over.[3] I ruled that I would not revoke paragraph 1 of the subpoena and instructed Respondent to turn over the material requested. Counsel for the Respondent asked that any material he gave counsel for the General Counsel not be shown to the Union unless it became necessary for the preparation of witnesses. On the second day of the hearing, counsel for the General Counsel informed me that early in the morning she asked counsel for Respondent, Haber, for the materials covered by the subpoena and he replied that he did not intend to turn over any of the documents and that he would be requesting special permission from the Board to appeal the administrative law judge ruling.[4] Nevertheless, later that day, counsel for the Respondent attempted to show a purported employee handbook to a witness and to pose questions thereon. Counsel for Respondent wished the witness to testify concerning a purported policy on distribution contained in the handbook. Counsel for the General Counsel objected to Respondent's attempt to use a document which should have been turned over to her pursuant to the subpoena. I then ruled that Respondent would be precluded from using material which should have been given to counsel for the General Counsel. I informed counsel for the Respondent that I would not permit him to introduce the handbook nor to introduce secondary testimony about it because he had refused to give the material to counsel for the General Counsel when she requested it earlier that day. On the third day of the instant hearing, after the completion of General Counsel's case, counsel for the Respondent offered to turn the handbook over to counsel for the General Counsel.

Paragraph 3 of the General Counsel's subpoena duces tecum requested that Respondent turn over campaign material distributed by Respondent. On the first day of the instant hearing, after discussion of Respondent's petition to revoke, I ruled that Respondent should provide General Counsel with campaign materials distributed from January to September 1990. Counsel for the Respondent took exception to my ruling and stated his intention to request special permission to appeal. Counsel for Respondent filed his request to appeal with the Board on the third day of the hearing and the Board's denial of Respondent's request was not received until the close of General Counsel's case. I ruled that Respondent would be precluded from using at the hearing any materials which should have been provided to counsel for General Counsel under paragraph 3 of the subpoena. *Bannon Mills*, 146 NLRB 611, 614, 633–634 fn. 4 (1964).

On November 25, 1992, counsel for the General Counsel filed a motion to strike portions of the record relating to the material requested in General Counsel's subpoena duces tecum. I hereby grant the motion with respect to the material on the following pages relating to paragraph 1 of the subpoena: 430, 446, 448, 450, 493, 524, 600, and 601. I deny the motion with respect to the material relating to campaign literature requested in paragraph 3 of the subpoena because counsel for the General Counsel did not object on the record when the witnesses were being questioned. I note, however, that the testimony now sought to be stricken was inconsequential.

[2] Errors in the transcript have been noted and corrected.

[3] As noted above, the Union did not make an appearance until served with two subpoenas by Respondent and counsel for the Union remained in the hearing room only long enough to present a petition to revoke and listen to my ruling.

[4] I note that Respondent did not at any time request special permission to appeal from my ruling on par. 1 of General Counsel's subpoena.

C. *Alleged Unlawful Statements to Employee Lester Ford*

1. Background

Lester Ford was hired in March 1989 as the independent living coordinator for the group homes division. It is Ford's responsibility to help the clients learn how to find jobs, how to find housing and how to perform other tasks that will enable them to live in the outside world. Ford learned about the union organizing campaign in February 1990 when he saw union organizers outside the office and received literature from them. Ford spoke to other employees about the Union. Counsel for the General Counsel presented extensive testimony by Ford and others to show that beginning in April 1990 Respondent conducted meetings at which the Union was discussed and at which Ford was an outspoken supporter of the Union. The purpose of giving the substance of what occurred at these meetings was to set the stage for allegedly unlawful statements made to Ford after each of these meetings by his direct supervisor, Chestine Greenee.

2. The April meeting

Ford described a staff meeting held in April 1990 at Respondent's facility at Albermarle Road in Brooklyn. According to Ford, the meeting was chaired by John Plowden, the assistant program director of group homes for Graham-Windham. Also in attendance were Ford's superior, Director of Group Homes Chestine Greene, and other supervisors, social workers, childcare workers, and clerical employees.[5] Plowden told the employees at the meeting that the Union was connected to organized crime and that he had newspaper clippings which showed that there was corruption in the Union. Plowden said the Union was only interested in receiving dues money. He added that the Union was a meatcutters union and not suited to a foster care agency. At this meeting, Greene said she wanted to know why employees were interested in the Union. Ford spoke up and said that the Union was needed to correct conditions at Graham-Windham. He said the personalities involved were not the issue; the only issue concerned conditions at work. When Plowden asked what complaints the employees had, various employees responded. According to Ford, Plowden made notes of the complaints and said he would look into the problems.[6]

Plowden testified that the April 1990 meeting was held to discuss the processes of the agency and to encourage childcare workers and social workers to work together. Plowden stated that the Union was not discussed at this meeting. He said that he first saw a newsclipping alleging a union tie to organized crime in June or July at a meeting conducted by Al Rodriguez, Respondent's director of management information systems, and attended by social workers and childcare workers. Plowden denied mentioning the Union at the April meeting; he denied telling the employees that the Union only wanted their dues and he denied asking employees about their complaints. Greene, however, recalled this April meeting, and she testified that Al Rodriguez spoke about a newspaper article that linked a union official to organized crime.[7] Rodriguez showed the clipping to Ford and Ford responded that one should not believe everything in the newspapers.

Rodriguez testified that he conducted a series of meetings beginning in late June and ending just before the election. Rodriguez evidently had an imperfect recollection about the timing of these meetings: he was vague as to whether there had been two or three meetings and he did not specify dates for any of them. Rodriguez stated that at a late July meeting at Albermarle Road he had discussed allegations of criminal conduct with Ford.

Former Graham-Windham employee Charlene Butler testified that she was a caseworker for Respondent from April 1990 until February 1991.[8] Butler testified in great detail about a meeting held in April at which the Union was a major topic. According to Butler, Greene, and Plowden were there, along with other supervisors, childcare workers, caseworkers, and Lester Ford. The participants in the meeting discussed methods of dealing with the children in group homes. In addition, Plowden told the employees that if a union came to the agency, they would have a middle man in grievances. Plowden said the Union was a butcher union with ties to organized crime. Butler particularly recalled that Plowden had a news clipping in his hand. Ford said that the employees needed a union and that employees could now be fired for no reason. Ford said workers in group homes were overworked and that caseworkers had too many cases to handle. Greene acknowledged that there was too much work. Greene asked the employees how they felt about the Union and asked what concerns they had that management could address. A discussion of benefits and insurance coverage available to employees ensued. Ford said the agency would benefit from the Union because the Union would represent the workers' interests; employees at Graham-Windham were overwhelmed but were afraid to speak out.

Ford testified that after the meeting, Greene called him into her office. Greene said she was upset about what Ford had said in the meeting. She advised Ford to moderate his rhetoric and to consider whether or not he wanted to continue working at Graham-Windham. Greene said that word was getting around that Ford was antiagency. Ford replied that he was not antiagency and that he wanted to continue at Graham-Windham but that certain conditions had to be corrected.

Greene denied that she discussed the Union with Ford in a meeting in her office and she denied telling him to moderate his rhetoric; she did not ask whether he wanted to remain with the agency.

3. The May meeting

According to Ford, at a staff meeting in May 1990 the Union was the only topic under discussion. Plowden again mentioned an alleged union connection to organized crime and said the Union only wanted the employees' money and would turn them against the agency. Ford testified that he said the real issue was conditions at Graham-Windham. Ford told the meeting that he had heard that social service agencies with union representation enjoyed better relations be-

[5] Of the rank-and-file in attendance, only social workers were not included in the appropriate unit.

[6] The complaint does not allege that Respondent unlawfully solicited grievances in April 1990.

[7] Greene said the meeting was not held at Albermarle Road, but she did not otherwise specify its location.

[8] Butler works for a different agency now.

tween staff and management and that the turnover rate was more favorable. Greene said that the Union was not good and that employees should not vote for the Union. She stated that a union was not necessary.

Butler recalled that this meeting was called to discuss a childcare issue but that it went off at a tangent in a discussion of the Union. Ford said many of the same things he had said at the first meeting and he added that at other agencies where the employees were represented by a union things were going well.

Plowden denied that at a meeting in May 1990 he discussed the Union or any other social service agencies whose employees were represented by a union.

According to Ford, after this meeting, Greene called him to her office and told him to moderate his rhetoric; word was getting around that Ford was an agency-hater.

Greene denied that she made any of the statements attributed to her by Ford.

4. The July meeting

Ford testified concerning a big meeting held at Albermarle Road in late June or early July 1990.[9] Chief Executive Officer Joyce Lapenn was in attendance as well as David Megley, the division director. Management again mentioned the newsclippings suggesting an organized crime connection with the Union and said committees would be formed with staff representation to investigate employee complaints.[10] Management did not want employees to vote for the Union; the employees were told that the Union was not interested in providing benefits or services but that it only wanted their dues. Ford spoke at the meeting and stated that he did not want to be on a committee that would make recommendations to management; rather, he wanted to be in a bargaining unit and negotiate a binding contract with the agency. Ford said he wanted to be a partner. There was a power struggle between the employer and the employees and he wanted to change the power dynamics. Other employees mentioned their complaints; the grievance policy and the pay scale are arbitrary, in the winter some of the children were cold and did not have proper bedding. The social workers complained about their case load. Lapenn stated that the Union had no experience in the field of foster care.

Ford testified that after this meeting, Greene called him into her office and expressed surprise that he could say such things in front of Lapenn and Megley. Greene said Ford was undermining her position by speaking out in staff meetings. She told him that he should moderate his rhetoric and consider whether he wanted to work at Graham-Windham. Greene told Ford he was a demoralizing factor in the office. Greene instructed Ford that from now on he was to limit his contact with clients, social workers, and the childcare staff. Ford's affidavit states that Greene told him to give her a memorandum if he wanted to contact childcare staff or social workers in carrying out his job duties. Ford said he could not work under those conditions. The next day, Ford called Megley and told him that Greene had placed constraints on him and that he could not do his work in those circumstances. Greene's restrictions on Ford's contacts were never enforced.

Plowden testified that a meeting was held in May or June to discuss the concept of therapeutic communities. Lapenn was not at this meeting. The object was to strengthen the antidrug message to the children. Plowden asserted that the Union was not discussed at this meeting. Plowden recalled that at this meeting Ford tried to discuss subjects related to the way the agency did business; Ford wanted to discuss team work and stipend checks. Megley brought the meeting back to its stated subject. Plowden did not recall any mention of employee committees at this meeting.

Megley testified that the meeting was conducted on July 2, 1990. Graham-Windham had received state funds to conduct a drug-alcohol abuse prevention program and the meeting was to prepare staff for the training. Megley stated that Lapenn did not attend this meeting. Megley recalled that Ford mentioned teamwork and other subjects, and that people were annoyed because Ford's comments were not relevant to the stated subject of the meeting. Megley said that no one mentioned the Union at this meeting and no one raised any allegations about organized crime nor did management propose employee committees. Megley testified that after the meeting he instructed Greene to tell Ford that his operational questions should be raised directly with Greene and that they had been inappropriate for the meeting. Megley testified that Ford never called and told him that Greene had imposed restrictions on him and limited his contacts with the staff; rather, Megley recalled that Ford had telephoned him in early June to complain that Greene had not made a decision on some program that he was interested in. Megley told Ford he would speak to Greene on his behalf, but that Ford had to work with Greene. Megley stated that he knew Ford supported the Union. Megley attended meetings with the staff where the Union was discussed in July and August before the election, but he could not recall how many there were.

Greene testified that the July 2 meeting concerned the concept of a therapeutic community. Megley was there, but Lapenn did not attend. According to Greene, there was no discussion of the Union at this meeting. Ford spoke about the lack of a team approach, he raised the issue of a problem with stipend checks and he discussed a racist incident at one group home. Greene stated that she spoke to Ford the next day in her office. She told him that he had raised improper issues at the meeting; the stipend checks were to be discussed directly with Greene. Greene told Ford he had been disruptive at the meeting because the meeting was not for the purpose of discussing any of the subjects he had raised. Greene did not ask Ford how he could make his comments in the presence of Megley and Lapenn.

Greene testified that on one occasion Ford had sought money for an event he was planning by going over Greene's head directly to the headquarters staff. On another occasion, he complained that the stipend checks were inaccurate without discussing the matter with Greene first. Greene told Ford that he should make fund requests through her. Greene recalled that in June 1990 she asked Ford what he was planning for the group home residents. Greene wanted to be sure the proper services were being provided and she wanted to know Ford's schedule and whereabouts. Greene told Ford to route all his memos through her. Greene denied telling Ford to report all his discussions with staff members and she did

[9] Ford's affidavit states that this meeting took place July 2, 1990.

[10] Committees were created and announced in January 1991, but Respondent maintains that these were not discussed with the employees before the election.

not tell him to limit his contacts with staff members and clients. Greene placed these directives in the context of her need to know what Ford was doing in his work. She stated that she never discussed the Union with Ford.

Greene testified that she did not discuss the Union between April and June 1990, and that she never met with Ford in order to tell him to moderate his rhetoric nor that he was getting a reputation as an agency-hater.

Lonnie Stafford, the vice president of residential services, was the highest official of Graham-Windham to testify in the instant proceeding. According to Stafford, once Graham-Windham became aware that the Union was organizing, it retained outside counsel and decided to mount a ''systematic strategy and campaign'' against the Union. The agency did not want the Union to be successful, and the campaign was ''very carefully orchestrated and strategized [sic] . . . .'' Stafford emphasized that management spent ''an inordinate amount of time . . . with our line supervisors'' on the antiunion campaign. Stafford testified that he and Rodriguez conducted three sets of group meetings with employees prior to the election, saying essentially the same things to small groups of employees. The first set of meetings took place in late June or early July. He and Rodriguez informed the employees that there would be a hearing and then an election. They told employees that a newspaper article linked an official of the Union with organized crime. Management informed the employees that the Union had a contract with another social service agency but the Union would not benefit them. At the second set of meetings, employees were told about provisions of the union constitution and about the dues structure. At the third set of meetings, management went through the same kinds of issues as had been discussed with the employees in the prior meetings, and it said that it hoped the Union would not be successful and urged employees to vote in the election. Stafford confirmed that he had told employees that they could end up with less than they had at the present time if the Union came in because all benefits are negotiated. Stafford acknowledged that even before the group meetings he described, there were communications from management to the employees about the Union. At regular staff meetings, management would give an update on union activities. Some employees asked questions about dues and some said they needed the Union. Although Stafford did not attend all the staff meetings held from February to June 1990, Stafford maintained that nothing was said about criminal activity.

5. Discussion

It is evident from the recitation of the facts above that issues of credibility must be determined in order to find whether Respondent's supervisors and managers made the statements attributed to them by the testimony of Ford. From Stafford's testimony, it is clear that Respondent mounted a carefully planned and comprehensive campaign to persuade its employees to vote against the Union. However, it does not follow from the fact that management had a careful plan that all the statements made on behalf of management were part of that plan. Individuals in a supervisory or managerial capacity may have made statements that neither Stafford nor Rodriguez knew about. Further, since Graham-Windham apparently held many meetings, both to deal with client issues and the union campaign, witnesses for Respondent and the General Counsel had trouble distinguishing among the meetings. Ford gave generally consistent testimony about the meetings. However, Ford attributed remarks about criminal connections to Plowden while Respondent's witnesses consistently attributed these remarks to Rodriguez. Ford stated that he first heard allegations about criminal activity in April, and this was confirmed by Greene, but Respondent's other witnesses placed these remarks in June or July. Ford is still employed by Graham-Windham and he has nothing to gain by testifying about the alleged unlawful remarks made to him by Greene. Indeed, Ford's testimony will not serve to advance his career at Graham-Windham.

Having observed Ford testify and respond to extensive cross-examination by counsel for Respondent and having compared Ford's testimony with the testimony of other witnesses, I conclude that Ford testified accurately to the best of his recollection. Ford generally recalled the substance of the meetings and I credit his testimony. I also credit Ford's testimony about his discussions with Greene and the statements she made to him. Greene's statements as related by Ford are consistent with the the substance of the meetings he attended and Ford's account of Greene's statements had the ring of truth.[11] As noted above, Ford had no motive to invent or falsify Greene's statements. I do not credit Greene's denials. Thus I find that in April 1990 Greene advised Ford to moderate his rhetoric concerning the Union and to consider whether or not he wanted to continue working at Graham-Windham. I find that in May 1990 Greene warned Ford that word was getting around that he was an agency-hater. I also find that in July 1990 Greene again warned Ford to moderate his rhetoric and to consider whether he wanted to work at Graham-Windham. By these statements, Greene was warning Ford that his outspoken support of the Union endangered his continued employment at Graham-Windham. I find that Respondent implied that Ford might lose his job if he continued to support the Union and that this tended to coerce Ford in his support of the Union. Respondent thus violated Section 8(a)(1) of the Act.

I credit Ford's testimony that in July 1990 Greene told Ford that he was undermining her position by speaking out in staff meetings. After Greene told Ford that he should moderate his rhetoric and consider whether he wanted to work at the agency, Greene instructed Ford that he was to give her a memorandum if he wanted to contact other staff members. Greenee acknowledged telling Ford that he should route all his memos through her but she stated this was for the purpose of knowing what he was doing about his job duties. Greenee also brought up an occasion when Ford went over her head and another occasion when he submitted an erroneous list for client stipends. However, these two incidents do not justify a request that Ford tell Greene if he wanted to contact other staff members and that Ford route all his memos through her, a directive that would permit Greenee to monitor and effectively control all of Ford's contacts with other staff members. Indeed, Greene's instructions to Ford show that Greene wished to limit Ford, an outspoken union supporter who engaged in prounion rhetoric, in his ability to communicate with other employees. Although Ford protested Greene's directive and it was never enforced, it is clear that

[11] Further, Butler corroborated the fact that Ford was outspoken in favor of the Union at the meetings in 1990.

Respondent communicated to Ford an instruction that would have permitted it to engage in surveillance of his union activities.[12] It is a violation of the Act for an employer to maintain a close watch on an employee in order to discourage conversation about union-related matters. *Stone & Webster Engineering Corp*., 220 NLRB 905, 919 (1975), enfd. in relevant part 536 F.2d 461, 468 (1st Cir. 1976). A directive that Ford communicate with other employees only through his immediate supervisor, given in circumstances where it would be clear to Ford that this was as a result of his support of the Union, had a tendency to restrain and interfere with Ford's union activities and violated Section 8(a)(1) of the Act.

6. The radio incident

Ford testified that Bill Dano, a union organizer had asked him to appear on a radio talk show before the election. After Ford accepted this invitation and mentioned it to people in the office, Greene called him into her office and said she heard Ford would be on the radio. Greene asked Ford what he would say, and Ford replied that he would say the same things he had been saying in the meetings. Thereupon, Greene asked Ford not to appear on the show; she said there were good things in store for Ford because he was intelligent and energetic, and that he should avoid actions which would make him seem like an agency-hater. Ford said he was not against the agency and that many people agreed with him. Finally, Greene told Ford that she had recommended him for his position and repeated her request that Ford not appear on the show. Ford agreed to consider the matter. In the event, Ford recorded a message for use on the radio show.

Greene testified that before the election she saw flyers announcing a radio program and that her boss informed her that Ford would appear on the radio. Greene spoke to Ford in her office and said she had heard Ford would be on the forthcoming radio program. Ford acknowledged that he had made a tape. Greene said she would rather Ford not appear on the radio program since it would make the agency look bad. Ford replied that he was not against Greene but that he was against the administration. Greene told Ford that she was part of the administration and she would rather Ford did not participate. Greene did not recall asking Ford what he said on the tape. Eventually, Ford said he would see if he could pull the tape back.

I have found generally that Ford is a reliable witness. With regard to this specific incident, Greene's recollection seems to be unreliable. Although Greene could not recall inquiring as to what Ford would say on the radio, she recalled that she asked him not to appear on the show because it would make the agency look bad. Greene did not explain how she knew Ford's statements would reflect unfavorably on Graham-Windham if she did not know what Ford planned to say. I shall credit Ford's version of his conversation with Greene and I shall not rely on Greene's testimony. I find that Greene asked Ford not to speak for the Union on the radio talk show and that she told Ford ''good things'' were in store for him and that he should avoid actions that made him seem like an agency-hater. The term ''agency-hater'' was one Greene had employed when chastising Ford for speaking in favor of the Union at employee meetings. In effect, Greene was telling Ford that the ''good things'' would come to pass if he refrained from voicing his support of the Union on the radio. I find that Respondent violated Section 8(a)(1) of the Act by implying that Ford's future with Graham-Windham would be enhanced if he refrained from supporting the Union.

7. The poster incident

Ford shares a small office with another staffperson. Many documents are posted on the walls of the office, including pictures of clients, cards from clients, and papers relating to staff duties. Several days before the election, Ford affixed a union poster to the wall in his office: the next day it was gone.[13] Ford testified that he asked Greene about the poster and she said it was taken down because it was against agency policy to have posters in the office. Ford replied that there were many antiunion posters in the office and that staff were wearing ''union busting'' buttons. About 10 minutes later, according to Ford, Greene came into his office carrying the poster; she told Ford to call the main office to request permission to put the poster back on the wall. Ford stated that he had never needed permission before this incident in order to post matter on the wall.

Greene testified that she knew Ford had a poster on his office wall for 2 or 3 days. One day, Ford asked her if she knew what had happened to his poster. Greene said she did not know but that she would look around. Greene found the poster in a management office; although she recalled that it was on the floor near a trash can, Greene could not recall if it was in the office of John Godwin, a childcare supervisor, or the office of John Plowden, the assistant director of group homes. Greene made no inquiries of management, and she returned the poster to Ford and told him he could put it back up on the wall. Greene denied that she told Ford the poster was removed pursuant to agency policy, she denied saying management had taken down the poster, and she denied telling Ford he needed permission to put the poster back up. Plowden testified that he heard there was a union poster in Ford's office, but that he did not remove it and did not know who had done so. Godwin did not testify.

I shall credit the testimony of Ford concerning the poster incident. As discussed above, he is a more reliable witness than Greene. Further, although it is clear from Greene's and Plowden's testimony that Ford's poster was a matter of discussion, Greene testified that she made no inquiries as to who might have removed the poster just before the election. This testimony strains credulity. I find that Ford had various items posted in his office and that there were antiunion posters around the agency. Ford had never been required to ask permission before posting material on the walls of his office. I find that Greene told Ford the union poster was taken down because it was against agency policy. I find that when Greene returned the poster to Ford, she instructed him to request permission of the main office before he put it back up. The evidence shows that Respondent violated Section 8(a)(1) of the Act by permitting the posting of material in employee offices, including antiunion signs, but by disparately prohibit-

[12] ''[T]he test for an 8(a)(1) violation is whether . . . surveillances tend to be coercive, not whether the employees are in fact coerced.'' *Sturgis Newport Business Forms*, 563 F.2d 1252, 1256 (5th Cir. 1977).

[13] The poster measured 8 by 15 inches and it bore pictures and statements of Graham-Windham employees who favored the Union.

ing the posting of material favoring the Union unless permission had been obtained from the main office. *New Process Co.*, 290 NLRB 704, 708 fn. 18 (1988).

D. *Alleged Promise of Benefits*

Graham-Windham had Long been lobbying the state government in Albany for additional money from the State Department of Social Services. Stafford testified that in early August 1990 he learned that funds would be made available for the purpose of increasing the wages of employees in the foster care residential programs and to hire more staff. Stafford testified that he did not know when this money would actually be made available by the State. In the event, Respondent decided to tell the affected staff members the ''welcome news'' on August 8, 1990, the day of the staff picnic at the Hastings campus.[14] This date was 14 days before the election scheduled for August 22. A memorandum was prepared which stated in part:

> We have been informed that the New York State Department of Social Services has now provided, effective July 1, 1990, a significant increase in available salary and fringe benefits in foster care programs, which will likely mean between $1000 and $2000 per employee for approved child care and social work staff. . . .
>
> Much has yet to be determined as to how this impacts on our staff and our overall plans for the coming months. We are hopeful that all of this can be finalized and implemented as early as possible.

According to Stafford, the supervisors were told to distribute the memo to the staff and to answer any questions the employees might ask. The supervisors were instructed to inform the employees that if the Union won the election, the additional state money would be a part of the bargaining between Graham-Windham and the Union.

Childcare worker Betty Williams testified that Unit Manager Jack Toone called her into the office and handed her the memorandum at the end of her shift. Toone instructed Williams to read the memorandum and inquired whether she understood what it said. When Williams asked Toone to explain the memorandum to her, Toone replied that she would get between $1000 and $2000 but that if the money did not come through before the Union vote and the Union won, then it would have to go on the bargaining table for benefits and dues.

Toone denied that he mentioned the Union at all to Williams; he did not mention benefits, nor did he discuss the election and possible negotiations. Toone explained that he believed Williams to be a union advocate and he did not want any controversy to arise. Toone testified that he had been instructed to tell each person under his supervision that Albany had said money would be available to employees at the agency. He was told that he could not promise when the money would come. Toone stated that he knew he could not make promises to employees nor threaten them in connection with the Union. Toone said his instructions were to share the good news with the employees and that there was no connection with the Union. However, Toone also testified that he did not get instructions about what to say to employees because the memo was self-explanatory. Respondent admittedly had an exhaustive planned campaign leading up to the August 22 election. In addition to the fact that Toone's testimony was self-contradictory it was inconsistent with Stafford who testified that supervisors were indeed told what to say to the staff. Moreover, I find it hard to believe that 2 weeks before the election, Respondent instructed its supervisors to hand a memo about a significant pay raise to unit employees but that it did not tell the supervisors what to say to the employees. I do not credit Toone's testimony and I do credit the testimony of Williams. Thus, I find that Toone told Williams that she would received a wage increase of between $1000 and $2000, but that if the money came after the election and the Union won the election, then the possible wage increase would be part of the bargaining with the Union.

Childcare worker Ruth Askew testified that on the morning of August 9, 1990, just as her shift was ending, Supervisor Sadie Oliver spoke to her about the memorandum. Oliver told Askew that the employees would receive between $1000 and $2000 but that if the money came after the election and the Union came in, there was a chance employees would not receive as much and it would have to be negotiated. Although subjected to vigorous cross-examination, Askew was unwavering in her testimony: she was told that if the Union was successful, the state funds were subject to negotiation and employees might receive less than the stated figure of $1000 to $2000. Askew also recalled that Oliver told her employees did not need the Union because Graham-Windham was like a family and did not need any more people to tell it what to do. Graham-Windham would sit down and discuss things with employees and ''give us a break.'' But if the Union came in it could not save our jobs. Oliver told Askew that Graham-Windham was going to rehabilitate two closed cottages and hire more staff.

Oliver testified that she first became aware of the union campaign in July 1990. Then, she stated that management met with supervisors beginning in January and told them about the campaign. Oliver obviously had no independent recollection of the union campaign or she would have been better able to place the relevant events in a coherent time frame. Oliver testified that she was given the welcome news memorandum and told to share the news with the staff. Oliver recalled that she was told that it was still to be determined just how much and when the money would be given out. I formed the impression watching and listening to Oliver that she had rehearsed her testimony, learned it by rote so that it could be repeated time after time, but that she had no actual memory of the matters as to which she was testifying. Oliver denied handing the memorandum to Askew and she denied speaking to her about it or saying that Graham-Windham would rehabilitate some cottages. I do not credit Oliver.

Kachina Riley, now a resident of Florida and the owner of her own business in a field unrelated to Graham-Windham's activities, testified that she had been a supervisor in the foster care program before she resigned in December 1990. Riley attended many meetings called by management to inform the supervisory staff how to respond to employee concerns about the union campaign. Riley testified that when the ''welcome news'' memorandum was to be distributed to the rank-and-file employees, she was told to alert them that

[14] The memorandum was distributed to employees on the Hastings campus and at the group homes division.

the raise could not be given until after to see if the Union won. If the Union was successful, then the raise would be held up pending the contract negotiations. Riley had an impressive demeanor and I became convinced of her credibility as I observed her being cross-examined by counsel for Respondent. I shall rely on Riley's testimony.

It is clear that both Toone and Oliver told employees that if the money from the State was received after the election and if the Union won the election, then they might not get as much as $1000 to $2000 because the amount of the raise would be subject to negotiation with the Union. Given the fact that these statements were made on August 8 and that the election was to be held in 2 weeks time, employees knew that if they did not get a raise before the election, a union victory would delay and perhaps decrease the amount of the raise they ultimately received. Respondent presented no evidence to show how it had arrived at the $1000 to $2000 figure. Nor did it show why, if the raise were subject to negotiations with the Union, employees might get less than the figure Respondent named. No reason appears on the record why the $1000 to $2000 would not be available for employee raises if the Union won. The only reason would be that Respondent would not offer as much in the bargaining as it would have granted as largesse if the Union lost. Thus, Respondent told its employees that if they voted against the Union they would receive a raise of between $1000 to $2000 but that if they voted for the Union, the amount and timing of the raise was up in the air. Respondent's statements to its employees implied that they were more sure of the raise if they voted against the Union and thus tended to interfere with and coerce employees in the exercise of their rights. Respondent thereby violated Section 8(a)(1) of the Act.[15]

As discussed above, I find that when Supervisor Oliver told Askew about the increased state funding for raises, she also said that Graham-Windham would sit down and discuss things with employees and give them a break but if the Union came in it would not save their jobs. In addition, Oliver said the agency would rehabilitate two closed cottages and hire more staff. The General Counsel contends that these statements implied that employees would receive better conditions if they voted against the Union and might lose their jobs entirely if the Union won the election. I agree that Oliver's promise that Respondent would give the employees a break, improve conditions generally and that the Union could not save employee jobs violated Section 8(a)(1) of the Act by connecting a vote against the Union with better conditions and retention of jobs.

E. *Alleged Unlawful Prohibition of Distribution of Union Flyer*

Childcare worker Anita Burks testified that on a day in August 1990, when a special event took place on the Hastings campus, she handed out some union flyers to fellow employees. The flyer consisted of a handwritten page prepared by Burks the day before. Burks at first testified that the event took place on August 8 and that it was either the staff picnic or May Taylor Day.[16] However, it became clear during Burks' testimony that she had no recollection whether she distributed the flyers during the staff picnic when there were no children around the campus or whether it was May Taylor Day when the children were free to roam around the campus and had to be supervised by the staff. Eventually, Burks' confusion as to what was taking place on campus during that day became evident and she became uncooperative. The General Counsel contends, and Burks testified, that Burks was handing out literature on her own time before she went on duty and that Assistant Residence Director Robert Egan told her she could not give out a union flyer on Graham-Windham property either on her own time or on her worktime. Respondent contends that Egan was informed that Burks, who was admittedly on campus before she was on formal working time, continued distributing the flyer after her worktime began and was told she could not do that. Although Burks testified at length, I will not rely on her testimony because I find that her recollection is faulty, confused and vague; further, Burks became uncooperative at a certain point and ceased trying to answer the questions posed to her.

The matter does not end there, however. The General Counsel produced another witness, childcare worker Annie Milton, who was present during the relevant events. Milton testified that on May Taylor Day at about 3:30 p.m., she saw Burks handing out a union flyer on the Hastings campus near the pond where children were playing games.[17] Then Supervisor Oliver came up to Burks and instructed her to report to Egan's office. Burks asked Milton and another employee to accompany her as witnesses and they walked with Oliver to see Egan. As they stood in Egan's office, Milton heard Egan tell Burks that it was against agency policy to pass out leaflets about the Union. Burks replied that she had only engaged in the distribution for a little while on her own time before she signed in, but Egan responded that she could not do it any time. Egan stated that Burks could not pass out the flyers on the campus; once she was through the gate she could not pass out any flyers. Milton testified that Burks was not the only person giving out flyers on the campus that day; Supervisor Les Jones gave her a leaflet and said, ''Say no to the Union.'' Milton stated that this was not the ''welcome news'' memo. Jones did not testify. I shall credit Milton's testimony.

Unit Manager Toone saw Burks handing out literature at about 3:30 p.m. He did not know whether Burks was on duty and he did not tell her to stop. Toone said this incident took place at the staff picnic, and he produced a typed flyer prepared by the Union which he stated Burks gave him in exchange for the ''welcome news'' memo.

[15] The facts do not support a finding that Respondent, which had not received the funds from the State, withheld the raise from its employees. Nor does the record support the General Counsel's contention that Graham-Windham learned of the additional funds in July but withheld announcement until August. The record shows that Respondent learned that it would receive additional funds in August, and that the funds would be retroactive to July.

[16] Every year, Graham-Windham hosts a staff picnic on the Hastings campus. Most of the children are sent to an off-campus event in the care of the summer staff so that employees will be free to enjoy the picnic. In 1990, the staff picnic was held on August 8 from 9:30 a.m. until 7:30 p.m. May Taylor Day, named for a benefactor of Graham-Windham, is a day of carnival activities for the children including rides and a cookout. The childcare staff is on duty to watch over the safety and behavior of the children. In 1990, May Taylor Day was held on August 15.

[17] Milton testified that she never attends the staff picnic.

Director Egan testified that on the day of the staff picnic Oliver came to his office and informed him that Burks was distributing union literature to the staff. Egan stated that he was certain Burks was on duty and that this occurred after 4 p.m. That day, according to Egan, Burks' scheduled reporting time was 3 p.m. Egan instructed Oliver to send Burks to him. When Burks appeared with Milton, Egan told her she could not distribute material such as union literature while she was on duty. Egan acknowledged that his duties require him to review all daily sign-in sheets and weekly timesheets; he also acknowledged that Burks' timesheet for August 8, the day of the picnic, shows that she worked from noon until midnight. Egan did not explain the discrepancy between his recollection and Burks' timesheet. Egan testified that Burks' duties began at 3 p.m. when she was to provide supervision and care to the children. He stated that she could not have done her duty if she was near the pond area. However, Egan, by his own account, did not call Burks to task for neglecting her duties; he only reprimanded her for distributing union literature. I shall not credit Egan about this incident as I am convinced that he does not have a firm recollection of the events and shaded his testimony to favor Respondent.

Oliver testified that she saw Burks handing out literature on the day of the picnic at about 3:45 p.m.[18] At 4:15, Oliver testified, she observed Burks still socializing with the staff and handing out literature. Oliver went to Egan's office and informed him that Burks was handing out literature and had not taken over her responsibilities to the children who had returned from a field trip. According to Oliver, when she accompanied Burks and Milton to Egan's office, Egan told Burks to take over her responsibilities as she was on duty from 4 p.m. and could not pass out literature. Oliver stated that on the way out of Egan's office, Burks told her, ''If you didn't want me to pass out literature you could have told me yourself.'' I have found above that Oliver is not a reliable witness. Further, Oliver testified that Burks was on duty from 4 p.m., contrary to Respondent's records and also contrary to Egan's testimony. I shall not credit Oliver's testimony about this incident.

Stafford, who was director of the Hastings campus before he became a vice president of Graham-Windham, testified that on the day of the staff picnic he observed employees distributing literature on the campus. Stafford saw Burks giving out a flyer from about noon or 12:30 p.m. until 3 or 4 p.m. Stafford could not recall what time Burks was due to commence work on that day.

As noted above, I precluded Respondent from introducing any evidence about a purported rule concerning distribution on its property because Respondent failed to comply with my ruling that it turn over employee handbooks and rules in response to General Counsel's subpoena duces tecum. Further, because Respondent failed to produce the material in response to the subpoena, the General Counsel may introduce secondary evidence in support of the allegations.

Kachina Riley, a most impressive witness and a former supervisor of Graham-Windham, testified that as a supervisor she never reprimanded any employee for soliciting money or selling goods during working hours. Riley said that people sold Avon, raffle tickets, lingerie, candies, and cookies at Graham-Windham. Riley testified about an instance when a manager named Ray, the director of the foster care program, asked her to buy something in his own office. Riley and Ray bought raffle tickets together on occasion and Riley was sure she was on working time when she did this. Riley also paid funds towards an AIDS walkathon on her working time. Of course, Riley was not able to testify whether any of the other people may have been on a break when they engaged in this activity. Ray was not called to testify. I credit Riley that as a supervisor she was not aware that she should prevent employees from soliciting on working time. Riley was also not aware that she should refrain from buying things on her working time. I believe that if Riley, a very intelligent, well-informed, and obviously enterprising and dedicated person was not aware that there was any rule about distributing materials on working time, then there is no reason to believe that Respondent restricted solicitation or distribution.

Former employee Charlene Butler testified that from the beginning of her employment at Respondent, employees sold products and solicited funds on their working time. Both Plowden and Godwin signed up for a raffle that she was selling. Butler was sure that an employee who was scheduled to be working sold Tupperware to her while she herself was on worktime. In addition, Butler bought candy from Godwin on her working time. Neither Plowden nor Godwin testified that they were on breaktime when they were solicited by Butler. I shall rely on Butler's testimony.

Based on the credited evidence, I find that Graham-Windham did not enforce any rule against soliciting for sales or charity on working time and that both supervisors and rank-and-file employees regularly conducted solicitations and commercial activities while they were scheduled to be on duty. I find that Egan told Burks that it was against agency policy to pass out leaflets about the Union at any time: once Burks was through the front gate she could not pass out any flyers. Respondent violated Section 8(a)(1) by prohibiting the distribution of prounion material at any time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 (1945). It is clear that Respondent permitted the distribution of charity and sales materials by employees on working time and the disparate nature of Respondent's no-solicitation policy would be an additional ground for finding a violation.

F. *Conduct of Attorneys Boris and Haber*

Counsels for the Respondent, Richard S. Boris, Esq. and Neal D. Haber, Esq., also represented Respondent in the representation case that preceded the instant unfair labor practice case. The Stipulated Election Agreement in the representation case was signed by Boris on behalf of Graham-Windham. The stipulation names the Union as ''United Food & Commercial Workers Union, Local 342-50, Health Care and Human Services Division, AFL–CIO.'' The charge in the instant case names the Union as ''U.F.C.W. Local 342-50, AFL–CIO.'' The complaint gives the Union its complete name, including the phrase ''Health Care and Human Services Division.'' Respondent's answer, signed by Boris, denies that the Union named in the complaint filed the charge, denies that the Union is a labor organization within the meaning of the Act, denies that the Union filed a representation petition with the Board, and denies that the party which filed the instant charge appeared on the ballot in the election. The answer demands that the complaint be dismissed ''inasmuch [sic] as the putative entity identified in the Complaint as the

[18] Oliver did not see the document.

Charging Party is not the party who filed the unfair labor practice charge in the instant proceeding'' and ''the putative entity identified as the Charging Party is not a labor organization within the meaning of [the Act].'' From all of this verbiage it is apparent that Respondent's counsel objected that the Union gave its name without the phrase ''Health Care and Human Services Division'' when it filed the instant charge but that the Regional Director signed a complaint which added this phrase to the name of the Union.

At the commencement of the instant hearing, which was to last 8 days, I attempted to resolve this issue in the belief that it would be a waste of governmental resources to litigate an issue which on its face seemed illusory. In reply to my attempts, Boris stated, ''I don't know what Health Care and Human Services Division is.'' When I insisted that there was no importance to the inclusion in the name of the Union of the phrase ''Health Care and Human Services Division,'' Haber stated that the union which filed the charge was a different union from the one named in the complaint. Haber went on to state that he did not doubt that Local 342-50 was a labor organization but that he doubted that the entity named in the complaint was a union because it had a different name from the union which filed the charge. Haber was insisting that United Food and Commercial Workers Union, Local 342-50, AFL–CIO was a labor organization but that he could not say whether United Food and Commercial Workers Union, Local 342-50, Health Care and Human Services Division, AFL–CIO was a labor organization.

To put an end to this discussion, I stated on the record that I would find that the union named in the complaint was a labor organization under the Act.

However, my finding did not put an end to the efforts of Boris and Haber to litigate the status of the Union under the Act. On the third day of the instant hearing, counsel for the Union appeared before me for the purpose of filing and arguing a petition to revoke a subpoena duces tecum served on the Union at the instance of Haber. This subpoena required the Union to produce the union constitution, by laws, rules and regulations, all membership applications from January 1988 to the present, all documents filed with the U.S. Department of Labor, all correspondence with employees of any employer sought to be organized by the Union from January 1988 to the present, all collective-bargaining agreements entered into by the Union, and all documents relating to officers and staff of the Union from 1988 to the present. This subpoena probably would have required the Union to empty all of its files. Haber explained in support of the subpoena that he wanted all of this material because the charge omitted from the name of the Union the phrase ''Health Care and Human Services Division'' but that this phrase was added to the name of the Union in the complaint. Haber stated on the record that he was not sure the union in the complaint was the same union that filed the charge because the name was different. He stated that he doubted ''whether that is in fact the same labor organization or whether it is a different entity which may or may not be a labor organization.''

I granted the Union's petition to revoke and stated that the issue raised by Respondent as to the status of the Union was frivolous.

On the fourth day of the instant hearing, counsel for the General Counsel introduced into evidence and called to Haber's attention the Stipulated Election Agreement which named the Union as stated in the instant complaint including the phrase ''Health Care and Human Services Division.'' Thus, it was called to Haber's attention that the stipulation signed by Boris on behalf of Respondent named the Union in the style to which he and Boris had been objecting. I then invited Haber on behalf of Respondent to stipulate as to the status of the Union within the meaning of the Act and amend Respondent's answer. However, counsel for Respondent refused this further opportunity to agree to what must have been clear from the very beginning. Boris, having signed a stipulation that named the Union as being in the Health Care and Human Services Division, could have been in no doubt as to the identity of the Union which was named in the complaint. Yet he and Haber continued to express on the record their doubt that the Union named in the complaint was a labor organization under the Act. Indeed, Respondent only amended its answer to admit the labor organization status of the Union when the Board's decision in *M. J. Santulli Mail Services*, 281 NLRB 1288 (1986), was called to counsel's attention. I informed Haber on the record that he should read this case and that it would be discussed in my decision.

Section 102.21 of the Board's Rules and Regulations provides that:

> An answer of a party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney constitutes a certificate by him that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney may be subject to appropriate disciplinary action.

In the instant case, Attorney Boris signed Respondent's answer denying the labor organization status of the Union. Boris continued to express doubt that the Union was a labor organization on the record and then these doubts were continued on the record by Attorney Haber. Eventually, Haber caused to be served on the Union the subpoena described above. It is clear that Boris had knowledge and information that the Union, United Food and Commercial Workers Union, Local 342-50, Health Care and Human Services Division, AFL–CIO, was a labor organization. Boris had signed a Stipulated Election Agreement in June 1990, on behalf of Respondent with the Union.[19] Further, Haber stated on the record that he did not doubt that Local 342-50 was a labor organization within the meaning of the Act.

It is clear that Attorneys Boris and Haber maintained Respondent's position denying the status of the Union for purposes of delay. Much time was spent on the record in an attempt to secure a change in Respondent's answer. Further, Haber served on the Union a burdensome and frivolous subpoena, egregious in the scope and irrelevancy of the information sought, which had the effect of forcing the Union to serve and file a petition to revoke and to send an attorney to the instant hearing for the purpose of arguing the petition. The time required to deal with this frivolous subpoena caused further delay in resolving this lengthy case.

[19] See *Superior Industries*, 295 NLRB 320 (1989).

The facts recited above show that Attorneys Boris and Haber willfully violated the rule prohibiting the interposition of an answer for purposes of delay. I shall recommend that they be warned not to engage in similar conduct in the future and that the Board express its strong disapproval of their conduct in the instant case. *M. J. Santulli Mail Services*, supra at fn. 1; *Worldwide Detective Bureau*, 296 NLRB 148 (1989).

CONCLUSIONS OF LAW

1. By implying to its employee that he might lose his job if he continued to support the Union, Respondent violated Section 8(a)(1) of the Act.

2. By instructing its employee to direct all communications with other employees through a supervisor, Respondent violated Section 8(a)(1) of the Act.

3. By informing its employee that his future at the Employer would be enhanced if he refrained from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

4. By disparately prohibiting the posting of material favoring the Union unless permission was granted by the main office, Respondent violated Section 8(a)(1) of the Act.

5. By informing employees that they were sure of raises if they voted against the Union but that if the Union won the election the timing and amount of the raises was in doubt, Respondent violated Section 8(a)(1) of the Act.

6. By promising employees that the Employer would give them a break and informing employees that the Union could not save their jobs, Respondent violated Section 8(a)(1) of the Act.

7. By informing its employees that it prohibited the distribution of union literature at any time on its property, Respondent violated Section 8(a)(1) of the Act.

8. Richard S. Boris, Esq. and Neal D. Haber, Esq. willfully violated Section 102.21 of the Board's Rules and Regulations by denying the Union's status as a labor organization under the Act, without a good-faith doubt of the facts asserted in the complaint, for the purpose of delaying the proceedings.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Graham-Windham Services to Families and Children, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implying to its employees that they might lose their jobs if they support the Union.

(b) Instructing its employees to direct all communications with other employees through a supervisor.

(c) Informing its employees that their futures with the Employer would be enhanced if they refrain from supporting the Union.

(d) Disparately prohibiting the posting of material favoring the Union unless permission was granted by the main office.

(e) Informing its employees that they were sure of raises if they voted against the Union, but that if the Union won the election the timing and amount of the raises was in doubt.

(f) Promising its employees that the Employer would give them a break and that the Union could not save their jobs.

(g) Informing its employees that it prohibited the distribution of union literature at any time on its property.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities in the three divisions in the New York metropolitan area in New York State copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Richard S. Boris, Esq. and Neal D. Haber, Esq. are warned not to violate the Board's Rules and Regulations by interposing an answer without a good-faith doubt of the facts asserted in the complaint for the purpose of delay, and that the Board expresses its strong disapproval of their conduct in the instant case.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform you that you might lose your jobs if you support the United Food and Commercial Workers Union, Local 342-50, Health Care and Human Services Division, AFL–CIO.

WE WILL NOT instruct you to direct all communications with other employees through a supervisor.

WE WILL NOT inform you that your future will be enhanced if you refrain from supporting the Union.

WE WILL NOT prohibit the posting of material favoring the Union.

WE WILL NOT inform you that you will receive a raise if you vote against the Union.

WE WILL NOT promise you a break while telling you that the Union can not save your jobs.

WE WILL NOT prohibit the distribution of union literature at any time on agency property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GRAHAM-WINDHAM SERVICES TO FAMILIES AND CHILDREN, INC.